

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRELL CHATON YHARBROUGH,

Defendant-Appellant.

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UNPUBLISHED  
February 22, 2011

No. 295433  
Wayne Circuit Court  
LC No. 09-014943-FC

Before: BORRELLO, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, assault with intent to murder, MCL 750.83, felon in possession of a firearm, 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction, 20 to 40 years' imprisonment for the assault with intent to murder conviction, and two to five years' imprisonment for the felon in possession of a firearm conviction, to run consecutive to two years' imprisonment for the felony-firearm conviction. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

**I. FACTS**

This case arises out of a shooting that occurred at a party on Ferris Street in Highland Park on April 19, 2008, shortly before 1:00 a.m. When police arrived at the scene, they found Kory Gault dead, having sustained approximately 30 gunshot wounds. Leon Cottrell, who had driven Gault and two females to the party, was found by police in a nearby house severely injured in the shooting.

On the night of the incident, Cottrell had driven Gault, Donyell Fuller and Jocelyn White, to the party on Ferris Street in his Bonnevill. After they arrived, Cottrell entered a house party taking place at that location, which later moved outside. Eventually, the four returned to Cottrell's vehicle; Cottrell sat in the driver's seat, Gault sat in the front passenger's seat, and Fuller and White sat in the back seat. Cottrell testified at trial that just as he was about to drive off, he saw defendant, wearing all black, come out from the side of the house. A guy named "Tone" was on the other side of the house, serving what Cottrell described as defendant's lookout. According to Cottrell, after approaching the vehicle, defendant took off his hood,

turned his hat backwards so that Cottrell could see him, and slung an AK47 from around his back.

Cottrell testified that after defendant shot the streetlight, defendant then began shooting at the passenger's side of Cottrell's vehicle, striking Cottrell's shoulder. The car started to move in slow motion as Cottrell heard Fuller and White screaming in the back seat. Cottrell climbed out of the window as defendant continued to fire shots, and in the process of hitting the ground he broke his arm. Fuller and White got down on the floor until the shooting stopped, at which point they exited the vehicle and ran away. Cottrell pulled himself to the other side of the street using his unwounded arm. People helped Cottrell into the house where the party had taken place, and where he was eventually found by police and EMS personnel.

Highland Park Police Officer Michael Kumeisha and his partner, Officer Ryan Kalis, were the first to arrive at the scene of the shooting. The officers observed a Pontiac Bonneville slightly off the roadway with a man lying inside, partially hanging out into the street, and a large crowd in panic. The officers could tell that the man inside the vehicle, Gault, was deceased, having incurred multiple bullet wounds. Gault's feet were in the passenger compartment, his body was sprawled over the center console and driver's seat, and his upper body fell out onto the street. The second EMS unit applied a heart monitor to Gault's body to verify that all heart activity had ceased.

Highland Park Police Officer Herbert Alan Fluker, the officer in charge of this case, discovered a purple Plymouth Voyager in an alley near the crime scene while canvassing the area. The vehicle's transmission fluid was leaking and its engine had been punched, indicating that it had been stolen. Officer Fluker also met with Cottrell at Henry Ford Hospital. During this meeting, Cottrell identified defendant, whom he testified he had seen "a bunch of times," as the shooter. Cottrell also stated that, after defendant was done shooting, he dropped the AK47 and someone in the crowd picked it up, however, the police never recovered a gun in this case. Cottrell also told Officer Fluker that Patrick Mason was trying to find him, and that the reason defendant did the shooting was in retaliation for an alleged attempt by Cottrell to shoot Charles Chuckie Mason. Cottrell later refuted this statement at trial. Officer Fluker took a second statement from Cottrell at his home on June 5, 2008, after which Fluker then attempted to locate defendant. Eventually police brought defendant into custody from Seattle on April 22, 2009.

At trial, Dominique Yharbrough, defendant's sister, testified that she saw defendant the morning following the shooting at approximately 10:00 a.m. at her house. They went to Pizza Hut and Cold Stone for their little sister's birthday. In Dominique's opinion, defendant was not acting nervous or unusual that day. She testified that defendant spent the night at her place that evening. She saw him leave the next day by foot toward the bus stop. Dominique testified that she had no knowledge of where her brother was when the shooting occurred. She further testified that she knew that her brother went to Seattle sometime in June, but she did not know any further details about where he was living. After moving to Seattle, defendant stopped calling Dominique regularly or letting the family know his whereabouts.

Dr. Lokman Sung, who performed Gault's autopsy, testified that his cause of death was approximately 30 gunshot wounds and that the manner of death was homicide. Dr. Sung did not find any evidence of close range firing on Gault's skin. Michael Herriotte, a Forensic Technician with the Detroit Police Department, processed the stolen Plymouth Voyager found at

the scene. Herriotte and his partner were unable to successfully lift any prints from the vehicle's interior, but did lift one set of prints from the outside passenger side window. Amanda Crooker, who works in the State Police Department's Forensic Science Division as a Latent Print Specialist, received authorization to pull the fingerprint cards of defendant and others for purposes of comparison with the latent lift. She identified the prints as belonging to defendant.

Following closing arguments, the trial court instructed the jury, over the objections of defendant, that the jury could consider defendant's flight from the jurisdiction as evidence of consciousness of guilt. Following his convictions and sentences as stated, *supra*, this appeal ensued.

## II. ISSUES AND ANALYSIS

Defendant first argues that the trial court abused its discretion when it instructed the jury that it could consider defendant's flight from the jurisdiction as evidence of consciousness of guilt. We review the trial court's determination that a given jury instruction applies to the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). Reversal is appropriate only where the defendant demonstrates that it is more probable than not that the improper jury instruction resulted in a different outcome. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

In this case, the trial court determined that instructing the jury on flight was appropriate given the testimony indicating that defendant moved to Seattle after the alleged crime took place and broke lines of communication with his family. A trial court's decision to provide the jury with a given instruction is proper when the evidence presented at trial supports instructing the jury on the matter. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). Although evidence of the defendant's flight following the crime's commission cannot alone support a conviction, it is admissible to show consciousness of guilt. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). Evidence warranting a flight instruction includes fleeing the crime scene, departing the jurisdiction, evading police capture, resisting arrest, and attempting to escape police custody. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Defendant argues that because he did not leave until mid-June, approximately two months after the murder, his departure was too remote from the offense to warrant a flight instruction. This issue was previously addressed by this Court, in *Compeau*, 244 Mich App at 598, where we held:

The term 'flight' includes attempting to escape custody. The remoteness of the flight from the time of defendant's arrest did not affect the admissibility of the evidence, but was relevant only to the weight of the evidence. (Internal citations omitted.)

Based on our prior decision in *Compeau*, the trial court did not err in giving the flight instruction.

Defendant next argues that the mere fact that police brought him back to Michigan in custody without more evidence, does not raise an inference that defendant initially departed the jurisdiction with the intent to evade police capture. Defendant does not include all the evidence presented at trial when making his argument. For instance, although defendant regularly communicated with his sister, he did not inform her of his plan to move to Seattle until he actually left in mid-June. After defendant departed, he stopped calling his sister and failed to inform his family, including his mother, of his whereabouts. Also in June, a key witness identified defendant as the shooter on two occasions—first in a police interview on June 5, 2008, and again in an investigative subpoena hearing on June 12, 2008. June was also the time in which police sought a warrant for defendant’s arrest. This provided sufficient evidence to support a flight instruction, and the trial court did not abuse its discretion.

Defendant next contends that no evidence existed that showed that defendant knew the police wanted him in connection with the crime, at the time that he departed the jurisdiction, thus, the flight instruction was improper. As the Michigan Supreme Court recently stated in *People v Smelley*, 485 Mich 1023, 1023; 776 NW2d 310 (2010), however, “the prosecutor is not required to prove that defendant left the jurisdiction because he was ‘motivated’ by fear of apprehension. If that was [sic] required, flight evidence would rarely be admissible because it is obviously difficult to prove somebody’s motives.” Moreover, as mentioned above, the prosecution presented circumstantial evidence apart from defendant’s mere departure from the jurisdiction, to support the flight instruction. Namely, the evidence indicated that defendant severed communication with his family when he departed, and that his departure occurred in close proximity to when a key witness implicated defendant in the crime. Accordingly, the trial court did not abuse its discretion when it instructed the jury on flight.

Finally, contrary to defendant’s contention, the evidence of flight did not improperly shift the burden of proof onto defendant to show his innocence. Review of the record reveals that the trial court instructed the jury to determine whether the evidence of flight was true and, if so, whether defendant’s flight showed his consciousness of guilt. Further, even assuming that the trial court erred in instructing the jury on flight, the instruction was not outcome determinative because evidence apart from defendant’s flight supports his conviction. This evidence includes the key witness’s identification of defendant as the shooter, fingerprints placing defendant at the crime scene, and bullet wounds in the murder victim’s body consistent with the key witness’s description of the shooting. For all of the reasons stated *supra*, we find no error in the trial court’s instruction on flight.

Defendant next argues that the prosecution’s improper remarks during closing argument denied defendant a fair and impartial trial. We review preserved claims of prosecutorial misconduct de novo to determine whether the alleged error denied the defendant a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). For unpreserved claims, however, allegations of prosecutorial misconduct are reviewed for plain error affecting substantial rights.<sup>1</sup> *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Under plain error review, we will reverse only where the complained misconduct

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<sup>1</sup> The defense preserved all but one alleged error on appeal.

“resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant’s innocence,” and where a curative instruction could not have alleviated the prejudicial effect. *Id.* at 448-449.

The great latitude given to prosecutors allows them to argue the evidence and all reasonable inferences derived from that evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). “[A] prosecutor’s comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). For claims of prosecutorial misconduct, the question for the court is whether the prosecution’s statements had the effect to deny the defendant a fair trial. *Bahoda*, 448 Mich at 263.

Defendant first argues that the prosecution improperly vouched for a key witness when it stated: “I tell you if I been shot a couple of times, seeing somebody else shot like that, I don’t know whether I would be that sharp enough to make those observations to correctly assess the situation.” Prosecutors cannot vouch for their witness’s credibility in a manner that suggests that they have special knowledge regarding the witness’s truthfulness. *Bahoda*, 448 Mich at 276. The court sustained defense’s objection, warned the prosecution to avoid first person arguments, and the prosecution thereafter refrained from stating personal opinions. This statement, even assuming it was improper, did not deny defendant a fair trial. Viewing the prosecution’s commentary as a whole, the prosecution provided reasons in evidence aside from personal opinion for the jury to find the key witness’s identification testimony credible, among them that witness knew defendant before the shooting, and the shooter made his face visible to the witness before firing.

The defendant next argues that the prosecution argued facts not in evidence. “A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence.” *Ackerman*, 257 Mich App at 450. Here, contrary to defendant’s assertion, the prosecution never stated that defendant left Michigan because he knew a witness had identified him as the shooter.<sup>2</sup> Rather, the prosecution merely stated that, during the same month that a witness identified defendant as the shooter, defendant abruptly moved to Seattle. In overruling the defense’s objection, the trial court pointed out that the prosecution never mentioned specific dates and that the jury could decide what significance to place on the evidence. Second, the prosecution properly argued the evidence and reasonable inferences derived from the evidence when it stated that the gunshot wounds in the murder victim’s body, corroborating the key witness’s testimony, make the key witness’s story believable. The witness testified that defendant fired from the right, which is consistent with the multiple gunshot holes in the vehicle’s front passenger door and the gunshot wounds in the murder victim’s right side. Finally, the prosecutor argued facts in evidence when she said that the two females who witnessed the shooting could see the key witness and the murder victim talking with people on the street. According to their testimony, the females did, in fact, see the key witness and the murder victim talking to people at the party in an area illuminated by a streetlight.

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<sup>2</sup> The defense did not preserve this alleged error on appeal.

Defendant next argues that the prosecution improperly bolstered the key witness's credibility when she argued that the more one tells a story, the more details emerge. It is not misconduct for a prosecutor to appeal to the jury's common sense. See, e.g., *People v Fisher*, 220 Mich App 133, 160-161; 559 NW2d 318 (1996), overruled on other grounds *People v Houthoofd*, 487 Mich 568; \_\_\_ NW2d \_\_\_ (2010). Moreover, the argument responded to the defense's argument that the key witness was not credible because he provided three versions of the event and added details each time. See, *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997) holding that "[a] prosecutor's comments must be considered in light of defense arguments."

Defendant next argues that the prosecution impermissibly attempted to denigrate the defense's case. Prosecutors may not suggest to the jury that defense counsel is intentionally attempting to mislead them or otherwise denigrate the defense's theory of the case. *People v Watson*, 245 Mich App 572; 629 NW2d 411 (2001). Although a prosecutor cannot wage a personal attack against the defendant's attorney, an otherwise improper remark does not deny the defendant a fair trial where the prosecution's commentary, read in context, simply responds to the defense's argument. *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996). In *Kennebrew*, for example, the prosecution, in an attempt to place fault on the police, argued in closing argument that defense attorneys often attack police investigations as careless and incomplete. *Id.* at 607. In finding the prosecution's remark proper, this Court noted that the prosecutor's remark simply responded to the defense's argument that the police conducted a sloppy investigation. *Id.* at 608.

In this case, the defense portrayed the officer in charge of the case as dishonest and sloppy in his police work and, in fact, suggested that the officer framed defendant. In response, the prosecution reminded the jury to focus on defendant's guilt or innocence, since the officer was not on trial, and pointed out that defendant's theory that the officer framed defendant was illogical given that the officer did not have the prior knowledge necessary to implicate defendant in the crime. The defense also argued that the prosecution's key witness had a motive to lie because he wanted to pin the crime on someone since an individual named Alfi Hill was dead. In response, the prosecution pointed out if the key witness just wanted to put someone away, then he could just as easily have identified Hill as the perpetrator, and Hill was alive at the time the key witness initially identified defendant as the shooter. Viewed in context, the prosecution's commentary merely responded to the defense's theory of the case. *Kennebrew*, at 607-608; *Messenger*, 221 Mich App at 181.

Finally, contrary to defendant's contention, the prosecution did not shift the burden of proof onto defendant. Our Michigan Supreme Court has held that once the defendant advances exonerating evidence or a theory to support his or her innocence, the prosecution can comment thereon, and doing so cannot be said to transfer the burden to the defendant to prove his or her innocence. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Here, the prosecution responded to the defense's theories in the case when it pointed out that the defense failed to question officers and E.M.S. on the scene about whether the key witness identified the perpetrator and argued that the key witness had no motive to fabricate his testimony. Moreover, the trial court told the jury that attorney statements and arguments are not evidence, the prosecution bears the burden of proof, and the jury must decide the case based on the facts.

Under the circumstances, the prosecution acted properly and a new trial is unwarranted. Accordingly, we affirm the convictions and sentences of defendant.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Karen M. Fort Hood